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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

AMERICAN AIRLINES, INC., *Petitioner*,

v.

NORTH AMERICAN AIRLINES, INC., *Respondent*,

and the

CIVIL AERONAUTICS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 17, 1956

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the District of Columbia Circuit insofar as it reversed in part an order of the Civil Aeronautics Board.

OPINION BELOW

The opinion of the Court of Appeals is printed at pp. 1a-2a of the Appendix hereto (R. 481-482).[1] It has not yet been reported.

This opinion was rendered after this Court, at its last term, on the petition of this same petitioner, had reversed and remanded a previous judgment of the Court of Appeals in this proceeding. *American Airlines* v. *North American Airlines*, 351 U.S. 79 (1956). The earlier history of the proceeding is summarized in this Court's opinion. 351 U.S. at 80-81. The prior opinion of the Court of Appeals is reported as *North American Airlines* v. *Civil Aeronautics Board*, 228 F.2d 432 (1955).

The opinion, findings and order of the Civil Aeronautics Board, here involved, together with those findings of its Examiner which the Board specifically adopted are printed at pp. 2a-35a of the Appendix hereto (R. 199-230).

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1956 (R. 483). Petitioner and the Civil

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[1] For the Court's convenience, the petitioner has moved the lower court to send the transcript of the case to this Court. In an Appendix to this petition there are printed certain portions of that transcript which would seem to be the only portions which this Court need examine. In addition, however, there will be some reference herein to certain other documents in the transcript, not so much to invite the Court's attention to what is included therein as to point out what is *not* included. In the case of that portion of the transcript consisting of the proceedings before the Civil Aeronautics Board, reference thereto will be: "Tr. . . . ." In the case of that portion (including the Joint Appendix) consisting of the proceedings before the lower court the reference will be: "R. . . . .".

Aeronautics Board filed timely petitions for rehearing on July 27, 1956 (R. 484, 509). The Court of Appeals denied these petitions without further opinion on September 18, 1956 (R. 531, 532). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Section 411 of the Civil Aeronautics Act empowers the Civil Aeronautics Board, in the interest of the public, to prohibit the use of unfair practices in air transportation. The Board, acting under that section, found that the respondent air carrier's use of a recently adopted trade name, North American Airlines, caused substantial confusion, on the part of the traveling public, between it and the petitioner, which has been operating under a similar name, American Airlines, for nearly a quarter-century. To eliminate the cause of that public confusion the Board ordered the respondent to cease using in its name the word American, which is the dominant and distinctive word in the petitioner's long standing name. The Court of Appeals originally held that the Board had no jurisdiction to deal with such a case of trade name confusion. This Court ruled otherwise, reversed the Court of Appeals and remanded the case to permit review of the evidentiary support for the findings of confusion. On remand the Court of Appeals held the findings of confusion to be supported by the evidence but, *sua sponte,* reviewed the scope of the Board's remedial order, held that the evidence did not show that the dominant word in question "had acquired a secondary meaning," and therefore set aside the Board's order insofar as it forbade use of that word in any name other than the particular one, North American, which the respondent had been using, and

remanded the case to the Board for further proceedings. In the meantime, the respondent had changed its name from North American Airlines to Trans American Airlines. Under the ruling of the Court of Appeals this one-syllable change leaves the Board's order operative on the empty air.

1. The first question presented is whether the Court of Appeals, going beyond the purpose of this Court's remand, can review the scope of a remedial order where the respondent had made no objection thereto either before the Board or even before the Court of Appeals, thus defeating a limitation in the applicable statute which confines the reviewing court to the consideration of objections urged before the Board.

2. The second question presented is whether the Board's administrative discretion to frame a remedial order for the protection of the public is so limited that it cannot reach all variations of a confusing name unless a competitor has a property interest in the name in question, springing from a showing of secondary meaning, thus injecting into the law governing an agency's power, in the interest of the public, to remedy statutory unfair practices common law doctrines governing the rights of parties in private unfair competition cases.

STATUTES INVOLVED

1. Section 1006(e) of the Civil Aeronautics Act, 49 U.S.C. 646(e), provides in pertinent part:

> "No objection to an order of the [Civil Aeronautics] Board shall be considered by the [reviewing] court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Interpretation of this provision is of especially broad importance in federal administrative law because of similiar provisions appearing in numerous other statutes, such as Section 9(a) of the Securities Act of 1933, 15 U.S.C. § 77(i); Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(y); Section 24(a) of the Public Utility Holding Company Act, 15 U.S.C. § 79(x); Section 10(a) of the Fair Labor Standards Act, 29 U.S.C. § 210; Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e); Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717(r); Section 313(b) of the Federal Power Act, 16 U.S.C. § 825(l); Section 4(h) of the Federal Alcohol Administration Act, 27 U.S.C. § 204(h); and see *Sen. Doc.* No. 248, 79th Cong., 2d Sess. 289, n. 21 (1946), explaining Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1008(e).

2. Section 411 of the Civil Aeronautics Act, 49 U.S.C. § 491, provides:

> "The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."

Interpretation of this provision is also important beyond its impact upon the air transportation industry, for the provision is modeled upon the very similar Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. See *American Airlines* v. *North American Airlines*, 351 U.S. 79, 82 (1956). See also Section 337 of the Tariff Act, 19 U.S.C. § 1337; Section 202 of the Packers and Stockyards Act, 7 U.S.C. § 192(a); Section 4 of the Webb Export Act, 15 U.S.C. § 64.

STATEMENT

As this Court will recall, from its previous review of this case, the respondent and the petitioner compete as common carriers over the principal air route in the country—New York-Chicago-Los Angeles.

The petitioner's predecessor began business in 1930 as American Airways and the petitioner itself began business in 1934 as American Airlines, under which name it has operated and advertised its service ever since. As indicated by respondent's own counsel, the petitioner is "the top airline, the best known airline, in the United States." (R. 83).

Originally the respondent was named and did business as Twentieth Century Airlines. During the course of the year 1951 it began using the name North American Airlines for the first time. In March, 1952, it advised the Civil Aeronautics Board of this name change. 351 U.S. at 80. Thereafter, the Board instituted this proceeding under Section 411 of the Civil Aeronautics Act, based on the charge that the respondent's use of the North American name caused substantial public confusion as to the identity of the respondent and the petitioner because of the similarity of the two names. 351 U.S. at 80-81.

After a full evidentiary hearing before an Examiner, which this Court accurately described as "extensive", 351 U.S. at 81, and in which the petitioner participated as a party, briefs were filed with the Examiner by counsel for the Board's enforcement staff, by the petitioner and by the respondent. Each briefed the questions of fact as to the nature and extent of confusion and the legal question as to whether a Section 411 case had been made out. Counsel for the Board's staff and the petitioner each requested that a cease and desist order be entered prohibiting the respondent from using either the name North American or any other name which included the word American (Tr. 720, 757). The respondent's brief, on the other hand, did not discuss the question of the scope of the order to be entered if a Section 411 case were made out (Tr. 765-797).

The Examiner issued an initial decision, making elaborate findings as to the existence and extent of public confusion and dealing at length with the evidence and the legal issues on the merits. He concluded that an order should be entered requiring the respondent to cease and desist using the North American name "or any variation of the name 'American.'" (Tr. 816).

The respondent filed detailed exceptions, running to forty-five pages (Tr. 846-890). They all dealt, however, with the merits and did not advert to the question of the scope of the order to be entered if a Section 411 violation were established.

The petitioner and the respondent filed new briefs to the Board itself. The petitioner asked that the Board enter an order of the scope recommended by

the Examiner (Tr. 960), and, by relying on his brief to the Examiner, counsel for the Board's staff made the same request (Tr. 897). The respondent's brief, however, did not deal with the question of the scope of the order to be entered if it lost on the merits (Tr. 899-915).

In his oral argument to the Board counsel for the respondent did not even mention the matter of the recommended scope of the order (Tr. 997-1028). That argument, like the respondent's brief, dealt only with the question whether a Section 411 case had been made out.

In November, 1953 — three years ago — the Board rendered an opinion sustaining the Examiner, adopting many of his findings and making additional findings of its own. It concluded:

> "It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest, and we have determined that the public should be protected from the effects of the confusion shown on the record *by eliminating what we find to be the cause of such confusion.*" Appendix, p. 12a, *infra.* (Emphasis added.)

Thereupon it entered an order substantially as recommended by the Examiner, requiring that the respondent cease and desist from engaging in air transportation under the name North American "or any other name which includes the word American." Appendix, p. 14a, *infra.*

The respondent filed with the Board no petition for reconsideration or rehearing although the Board's rules permit such a petition. 14 C.F.R. § 302.37 (1953).

It appealed the case to the lower court under Section 1006 of the Civil Aeronautics Act and was granted a stay by that court pending appeal. A prehearing conference was held under Rule 38(k) of the rules of the lower court and a stipulation as to the issues was entered into by the parties and approved by formal order of that court (R. 306-311). The issues thus specified were directed solely to the merits and not to the scope of the remedial order.

In briefing the case to the lower court, the respondent confined its argument to the merits and did not question the scope of the order (R. 313-363). The brief of the petitioner pointed out specifically that the respondent had raised no question as to the scope of the order (R. 374). The reply brief of the respondent took no exception to this statement (R. 441-454). While there is available no transcript of the oral argument to the lower court, in fact no question was raised at that argument as to the scope of the order.

The lower court reversed the Board's order on the ground that a case involving name confusion was beyond the jurisdiction of the Board under Section 411 of the Civil Aeronautics Act absent a showing of deliberate deception or fraud. 228 F.2d 432, 437, 442-444.

This Court reversed the lower court's decision, holding that the Board's "evidentiary findings concerned confusion of the type which can support a finding of violation of § 411," adding that the case would be remanded for further proceedings "since we do not understand the court to have decided whether the Board's findings were supported by

substantial evidence on the record as a whole. . . .' 351 U. S. at 86.

Shortly after that decision this Court denied certiorari on a petition by this same respondent to review a decision of the Court of Appeals for the Ninth Circuit affirming a decree against the respondent in a private law unfair competition suit in a United States District Court in California. That suit had been brought by an aircraft manufacturing company in Los Angeles, North American Aviation, Inc., charging that the respondent's North American name had been fraudulently adopted to appropriate the good will of the manufacturing company. The District Court found that this charge was correct and enjoined the respondent here from using "the name 'North American', or any name of which the name 'North American' forms a part. . . ." *North American Aviation, Inc.* v. *North American Aircoach Systems, Inc.* (S.D. Calif., Cent. Div., 1955), Case No. 13,412-PH [unreported], *aff'd, North American Aircoach Systems, Inc.* v. *North American Aviation, Inc.*, 231 F.2d 205 (9th Cir. 1955), *cert. denied,* 351 U. S. 920 (1956).

Therefore, the respondent was compelled to change its name. It did so early in May, 1956, a few days before the present case was returned by this Court to the lower court. Without even advising either the Board or the lower court of its action, the respondent began doing business under the name "Trans American Airlines". This, of course, was a violation of the Board's Business Name Regulation, 14 C.F.R. § 291.28. That Regulation requires that a carrier secure Board approval for a changed name. 351 U. S. at 80.

The petitioner, by motion, advised the lower court of this action by respondent and requested that the lower court either declare inoperative or vacate its stay of the Board's order.

The lower court did not act on this motion. Rather, and without briefs or argument from the parties, it rendered the judgment here in question with the opinion set forth at pp. 1a-2a of the Appendix hereto. This opinion, as we have noted, sustains the Board's evidentiary findings of substantial public confusion, thus discharging the task for which this Court had remanded the case, and affirms the order of the Board requiring the respondent to cease and desist from using the North American name.

But then the opinion holds, in one sentence, that "the evidence does not support the finding of the Board that the term 'American' had acquired a secondary meaning" and in the following sentence adds, "Accordingly, we set aside the order of the Board insofar as it orders [respondent] to cease and desist engaging in air transportation under any other name which includes the word 'American.'." Appendix, p. 2a, *infra*.

Thus, the whole question of the scope of the Board's remedial order is dealt with by the lower court in a most abrupt manner *without the question ever having been raised by the respondent at any point, either before the Board or the lower court.* Moreover, after laborious and expensive administrative and judicial litigation, going all the way to this Court and lasting some four years, the Board's order is frustrated by a change in one syllable of the respondent's name—"North" changed to "Trans."

Finally, it should be noted that *the Board had not based its decision on the ground of secondary meaning.* We shall discuss this further, *infra,* pp. 22-24. Suffice it here to say that the respondent had argued to the Board *on the merits* that a finding of secondary meaning (in the technical trade-mark sense) in the word "American" was essential to a determination that the use of the name North American Airlines violated Section 411 and that no such finding could be made. Appendix, p. 9a, *infra.* The Board held that such meaning was established by the evidence but, beyond that, specifically held:

> "Even if respondent were correct in its arguments as to secondary meaning, we do not interpret section 411 so that respondent would prevail. We do not believe that in a case like the present, secondary meaning must be proven in order to protect the public against a clearly demonstrated and substantial public confusion. And this is certainly true where, as here, respondent has adopted a corporate name confusingly similar to the earlier adopted corporate name 'American Airlines'." Appendix, pp. 10a-11a, *infra.*

Thus, the lower court not only questions, on its own motion, the scope of the Board's remedial order at the very end of this long litigation. It also imposes a limitation on administrative discretion to protect the public — where a statutory unfair practice is established—imported from the common law's limitations as to the extent of private property rights in trade names.

Both the Board and this petitioner filed with the lower court petitions for reconsideration which included the grounds set forth in this petition. These were denied without opinion (R. 531, 532).

REASONS FOR GRANTING THE WRIT

It is submitted that the lower court has committed such patent error, so sharply in conflict with decisions of this Court as well as with decisions of other Circuits, that not only should the writ be granted but at the same time, without further proceedings, the Court should reverse the decision below, insofar as it sets aside the order of the Board.

1. THE LOWER COURT'S REVIEW OF THE SCOPE OF THE BOARD'S REMEDIAL ORDER, SUA SPONTE AND WITHOUT OBJECTION THERETO HAVING BEEN MADE BEFORE THE BOARD, CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT, AND SERIOUSLY CONFUSES A MOST IMPORTANT MATTER OF PRACTICE IN ADMINISTRATIVE LAW.

Section 1006(e) of the Civil Aeronautics Act, *supra*, p. 4, provides that the reviewing court *shall not consider* any objection to an order "unless such objection shall have been urged before the Board" or unless there "were reasonable grounds for failure to do so." There is no suggestion by the lower court, nor could there be, that there was any reasonable ground for the respondent's failure to have objected to the scope of the order before the Board. From the very first briefing of the case to the Examiner an order of the scope finally adopted by the Board was proposed and urged — and the respondent never voiced any objection thereto. It did not even file a petition for reconsideration with the Board after the Board had rendered its decision and issued its order. Thus, the controlling statute forbade the lower court from reviewing the scope of the order.

While this Court has never interpreted Section 1006(e) of the Civil Aeronautics Act, it has dealt at

length with other statutory provisions presenting the same question and with general principles governing the review of administrative action which involve the same problem.

One of the more recent cases is this Court's unanimous decision in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492 (1955), which involved Section 19(b) of the Natural Gas Act. For purposes of the question here, that section is identical to Section 1006(e) of the Civil Aeronautics Act. It provides:

> "No objection to the order of the Commission shall be considered by the [reviewing] court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so."

There, the Federal Power Commission, in fixing a natural gas rate, had refused to allow as part of the cost of service a loss from certain gasoline operations. Before the Commission the gas company objected that the method employed by the Commission in allocating the gasoline expense was erroneous and that a proper allocation would show that there was no loss. But it did not contend that, if there were a loss, the loss should not be disallowed. The reviewing Court of Appeals agreed with the Commission's method of allocation but then, *sua sponte*, held that the loss should not have been disallowed. This Court, on certiorari, reversed, setting forth at some length the reasons for not permitting a reviewing court to go beyond the

objections urged by the appealing party before the administrative agency. This Court said:

> "Section 19(b) reflects the policy that a party must exhaust its administrative remedies before seeking judicial review. To allow a Court of Appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirements of § 19(b) that objections must first come before the Commission." 348 U. S. at 499.

The Court added that Section 10(e) of the Administrative Procedure Act strengthens, rather than weakens, "the principle requiring the exhaustion of administrative remedies before permitting court review." 348 U. S. at 499-500.

Indeed, apart from specific statutory limitations upon the power of the reviewing court, it is a matter of general law governing review of administrative orders that the appellate court must limit itself to the objections urged before the administrative agency. This Court has enforced that principle with vigor:

> "We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States* v. *Tucker Truck Lines, Inc.*, 344 U. S. 33, 36-37 (1952) (footnotes omitted).

See also *United States* v. *Capital Transit Co.*, 338 U. S. 286, 291 (1949); *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U. S. 143, 154-155 (1946).

And in the Ninth Circuit, the Court of Appeals has properly interpreted Section 1006(e) of the Civil Aeronautics Act as barring its consideration of questions not plainly raised before the Civil Aeronautics Board. *Western Air Lines* v. *Civil Aeronautics Board*, 196 F.2d 933, 936-937 (1952), *cert. denied*, 344 U. S. 875 (1952).

The lower court doubtless felt that the foregoing decisions do not apply in a case where its objection goes to the scope of the remedy. But neither Section 1006(e) of the Civil Aeronautics Act nor the general principle which it reflects applies any the less to objections directed to the scope of the remedy than to objections to the merits of the case. So it was squarely held under the similar statutory provision involved in *National Labor Relations Board* v. *Cheney Lumber Co.*, 327 U. S. 385, 387 389 (1946); see *National Labor Relations Board* v. *Seven-Up Co.*, 344 U. S. 344, 350 (1953). *Accord: National Labor Relations Board* v. *Winter*, 154 F.2d 719, 722 (10th Cir. 1946).

Any doubt on this score should certainly be set at rest.

As a matter of fact, the very breadth of administrative discretion involved in fashioning remedy to violation, *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 613-614 (1946); *National Labor Relations Board* v. *Cheney Lumber Co.*, 327 U. S. 385, 388 (1946); *National Labor Relations Board* v. *Seven-Up Co.*, 344 U. S. 344, 346, 348 (1953), makes particularly compelling the application of this

principle where the question is one of objection to the scope of the remedial order.

That the error of the lower court is patent—unless decisions of this Court and of Courts of Appeals in other Circuits, referred to above, are to be overruled—is further evidenced by the lame effort to justify the lower court's action which appears in the respondent's answer to the petitions for rehearing filed by the petitioner and the Board after the lower court's decision (R. 523-530). In that answer the respondent states:

> "An accurate statement of the facts discloses that the hearing examiner in his initial decision proposed a sanction upon petitioner [respondent here] prohibiting it from using 'American' in its business name, to which petitioner [respondent here] excepted." (R. 529).

As authority for this statement the respondent cites its Exception No. 5 to the Examiner's initial decision (Tr. 852-855). That exception is set forth at pp. 36a-40a of the Appendix hereto. It is concerned solely with the respondent's argument on the merits that the evidence did not show confusion on the part of the traveling public between the respondent and the petitioner. There is not a word in this whole exception that is addressed to the *scope* of the order proposed by the Examiner. It merely urges that there should be *no order entered at all* because, allegedly, there had been no sufficient proof of confusion between the names North American and American.

Moreover, that this was the sole ground of the exception is fully confirmed by a reading of the briefs filed by the respondent both before the Board and the lower court (Tr. 900-914; R. 313-363, 441-454).

This Court has made it very clear that exceptions must "apprise the Board that petitioner intended to press the question now presented. . . ." *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 255 (1943). See *May Stores Co.* v. *National Labor Relations Board,* 326 U. S. 374, 386-387, n. 5 (1945); *Western Air Lines* v. *Civil Aeronautics Board,* 196 F.2d 933, 936-937 (9th Cir. 1952), *cert. denied,* 344 U. S. 875 (1952). The Board's rules require that an exception be specific "and shall state the grounds for such exception," and provide that an objection not covered by an exception "shall be deemed to have been waived." 14 C.F.R. § 302.30 (1953). Even had the respondent's exception stated that it objected to the remedy, that still would not be enough—for this Court properly insists that the ground be stated. An objection that the remedy is "contrary to, and unsupported by, the evidence and contrary to law" is not adequate notice to the administrative agency of the ground of objection to the remedy. *National Labor Relations Board* v. *Seven-Up Co.,* 344 U. S. 344, 350 (1953).

Nor is the lower court's departure from the decisions of this Court excusable because of the fact that a dissenting Board member disagreed with his brethren on the question of requiring that the name North American be dropped. The dissenter would have permitted use of that name with qualifying language to show that the respondent and the petitioner were two different carriers, on the theory that this would preserve the respondent's good will in the name North American and protect the public from confusion. Appendix, p. 21a, *infra.*

But this is a question very different from the objection now raised by the lower court. (It is notable that the respondent itself never did advance the view adopted by the dissenter.) The dissenter dealt solely with the issue of preserving good will established in the original name North American. The course he suggested would involve obvious practical difficulties in the case of a transportation company where spot radio and newspaper announcements are so important, and it is not surprising that the majority of the Board was not persuaded by the dissenter's suggestion. But the questions involved in that suggestion have nothing to do with the questions involved in determining whether to permit *other* variations of the word American, not theretofore used by the respondent and in which no good-will had been created. The reach of the remedy, in terms of forestalling other forms of the same violation of Section 411 of the Act — well illustrated in this case by the change of "North" to "Trans" — presents a set of considerations quite different from those voiced by the dissenter.

Indeed, the very fact that the dissenter focused attention on the remedy makes the lower court's action even less justifiable. The Board had every reason to believe that it was deciding all the questions which the respondent wanted to raise, for the dissent brought forward a different remedy and the respondent did not *even then* raise any question on the point by a petition for reconsideration, though entitled to do so under the Board's rules. *Supra*, p. 8. From beginning to end the respondent had made it as clear as though it had explicitly stated as much that respondent wanted its case to stand or fall on its right to use the name North American, and that, if any order were to

be entered, the scope of that order (which had been proposed in the very first briefs to the Examiner) did not concern it.

This, then, is an aggravated case of violence to the salutary principle which underlies Section 1006(e) of the Act and related provisions in other statutes. For here the respondent did not even carelessly sleep on its rights—it deliberately did not assert the objection now raised by the lower court. If this decision stands, every litigant before administrative agencies who contemplates seeking review in the District of Columbia Circuit will be encouraged to keep an ace up its sleeve. For after losing all disputed points the litigant is given strong hope that it will still be able to keep litigation alive by modifying its conduct in some minor respect and then starting anew on questions going to the scope of the remedy. The administrative process, already sufficiently slow, cumbersome, and expensive, would be irreparably harmed by the piecemeal treatment of issues invited by the lower court here.

2. CONTRARY TO DECISIONS OF THIS COURT AND OF OTHER CIRCUITS, THE LOWER COURT HAS IMPROPERLY INTERFERED WITH THE EXERCISE OF ADMINISTRATIVE DISCRETION IN THE CHOICE OF REMEDY TO PREVENT RECURRENCE OF LAW VIOLATION AND HAS DONE SO BY EQUATING THE PUBLIC'S RIGHT OF PROTECTION FROM STATUTORY UNFAIR PRACTICES WITH A PRIVATE PERSON'S RIGHT TO PROTECTION FROM PRIVATE LAW UNFAIR COMPETITION.

The lower court has fallen into another error, resulting from its mixing up two bodies of law—the law relating to an agency's discretion in protecting the public from statutory unfair trade practices and the law relating to the extent of a private party's

property interest in a trade name. In doing this, as we shall see, the court radically departs from principles established by this Court and other Courts of Appeals and injects serious confusion into an important area of administrative law.

When this case was here before, this Court held that the findings of confusion which the Board had made disclosed a Section 411 case, warranting a cease and desist order. Upon a remand to determine whether those findings were justified by the evidence, the lower court determined that they were. Thus, the lower court held, as indeed it had to under this Court's prior decision in this case, that the Board could order the respondent to cease using the North American name.

At this point only one question remained—assuming that the respondent had raised it, which it had not—i.e., whether it was reasonable for the Board to frame its order to reach *other* variations of the word American in a trade name.

Three settled principles bear on that question.

In the first place, it is hornbook law that an administrative agency, empowered to order a party to cease a practice found harmful to the public, is not limited to an order directed solely to the specific form of the practice involved in the case before it. Were the law otherwise, administrative agencies would be subjected to an intolerable runaround, and public protection could never catch up with the evil.

> ". . . the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its

> road block to the narrow lane the transgressor has travelled; it must be allowed effectively to close all doors to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473 (1952).

And see *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F.2d 52, 58, 59 (4th Cir. 1950); *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F.2d 968, 971-972 (3rd Cir. 1941).

In the second place, the only limitation upon the agency's power is that its remedial order must have a "reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 613 (1946).

In the third place, a reviewing court must recognize that the agency has "wide latitude for judgment," that it is to be expected to "draw from its generalized experience" in the area in question, and that "Its expert opinion is entitled to great weight in the reviewing courts." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 613, 614 (1946). See also *National Labor Relations Board* v. *Seven-Up Co.*, 344 U. S. 344, 346, 348 (1953).

None of these principles is recognized or applied by the lower court. Instead, after sustaining the Board's order against the North American name, its opinion proceeds abruptly to set aside the order against other variations of the American name on the ground that the evidence does not sustain the Board's finding that the word American has acquired a secondary meaning. This is done without any explanation of why the ground asserted requires the conclusion reached and

in spite of the fact that the Board had held specifically, as we have pointed out *supra*, p. 12, that its decision ***was not based upon its finding of secondary meaning.***

The clue to the lower court's rationale is to be found in its original opinion in this case, which was reversed by this Court. There, it will be recalled, the lower court had included in its opinion a long and rather obscure discussion of the law of private unfair competition and trade-marks, some passages of which suggest that the word American could not be the subject of a trade-mark. 228 F.2d at 440-443. In the light of that discussion it now appears that the lower court has concluded that this particular record does not show that the petitioner has an exclusive property right, as a matter of private law, to the use of the word American in an airline name — presumably illustrated by the fact that Pan American World Airways, during the petitioner's quarter-century of use of its name in domestic air transport, has also used the word in its name in the international field.[1]

But all this is beside the point. This is not a private law suit, and the petitioner made no effort to try it before the Board as though it were. In a private suit, where two companies have property interests in the same or a similar name, they may still have rights against each other which a court will adjust according to the equities, *Tillman & Bendel, Inc.* v. *California*

[1] As the Board pointed out in its opinion, these two carriers operate in quite different areas. Appendix, p. 10a, *infra*. In fact they do not serve a single common pair of points, and the petitioner's only international operations are limited trans-border services to Monterrey and Mexico City, Mexico, and Toronto, Canada, whereas Pan American World Airways does not operate in domestic United States transportation at all.

Packing Corp., 63 F.2d 498, 505-510 (9th Cir. 1933), and each may have rights against third party newcomers, *Del Monte Special Food Co.* v. *California Packing Corp.*, 34 F.2d 774, 777 (9th Cir. 1929). But, in any event, the niceties of private trade name law affecting the adjustments to be made in such situations as a matter of private property rights are based upon considerations wholly alien to the Board's concern in this case. For, under Section 411, as this Court in its prior decision made abundantly clear, the Board is concerned "not with punishment of wrongdoing or protection of injured competitors, but rather with protection of the public interest." 351 U. S. at 85. Thus, the only question for the lower court, even if the question had been properly before it, was whether the Board made an allowable judgment in fashioning its remedy to forestall continued confusion of the public when it determined, to use its own words, to eliminate "what we find to be the cause of such confusion." Appendix, p. 12a, *infra*.

Viewed in these terms, the error of the lower court was grievous. It is far fetched, indeed, to hold that the Board abused its discretion when it adopted precisely the same remedy as that applied, in similar cases, by the Federal Trade Commission over a span of more than thirty years in disposing of trade name problems under the analogous Section 5 of the Trade Commission Act. In *Galter* v. *Federal Trade Commission*, 186 F.2d 810 (7th Cir. 1951), *cert. denied*, 342 U. S. 818 (1951), the Commission order sustained was one which proscribed the use of the names Elgin, Hamilton, Remington, or Underwood, "or any simulation thereof, either alone or in connection with other words . . ." 44 F.T.C. 80, 102-103 (1947). In

Gold Tone Studios, Inc. v. *Federal Trade Commission,* 183 F.2d 257 (2d Cir. 1950), the Commission order sustained was one proscribing the use of the words Gold Tone "or any other word or words of similar import or meaning, either alone or in combination with any word or words as a corporate or trade name . . ." 45 F.T.C. 206, 217-218 (1948). In *Federal Trade Commission* v. *Real Products Corp.,* 90 F.2d 617 (2d Cir. 1937), the Commission order affirmed was one prohibiting the use of the word Champion "alone or in conjunction with any word or words . . ." 21 F.T.C. 714, 721 (1935). And in *Juvenile Shoe Co.* v. *Federal Trade Commission,* 289 Fed. 57 (9th Cir. 1923), *cert. denied,* 263 U. S. 705 (1923), the Commission order sustained was one prohibiting the respondent from using the word Juvenile as part of its corporate name. 5 F.T.C. 105, 111 (1922).[1]

As a matter of fact, courts of other Circuits have held such orders immune from the very attack made by the lower court here. In the *Juvenile Shoe* case, *supra,* one of the arguments made against the order was that the word Juvenile could not be preempted by a competitor of the respondent before the Commission. The Court of Appeals for the Ninth Circuit explicitly recognized the argument, pointing out that, "It is not asserted that the Juvenile Shoe Corporation [the competitor] has the exclusive right to the word 'Juvenile' as applied to shoes . . ." and that, "it

[1] Other cases which involved name confusion between two companies and in which the Commission has barred use of a word or words as *part* of a name include the following: Sewing Machine Sales Corp., 19 Fed. Reg. 5373 (1954); National Blind Industries, 18 Fed. Reg. 7189 (1953); Illinois Sewing Machine Distributors, 18 Fed. Reg. 4592 (1953).

may be that the word 'Juvenile' is not susceptible of appropriation as a trade mark." 289 Fed. at 59. Nonetheless the Court sustained the broad order of the Commission prohibiting use of the word Juvenile. Again in the *Galter* case, *supra*, a similar question was squarely presented. One of the arguments made against the Commission's order prohibiting all use of the words Elgin, Remington, etc., was that these words were not the exclusive property of some competitor of the respondent. But the Court of Appeals for the Seventh Circuit held:

> ". . . this is not an action for trademark violation but a proceeding to protect the public against fraud and deception. . . . Thus the Commission's order would have substantial support in the evidence even though the statements that the names in question belonged exclusively to Elgin, Remington and Underwood were wholly disregarded." 186 F.2d at 814.

See also *Pep Boys—Manny, Moe and Jack, Inc. v. Federal Trade Commission*, 122 F.2d 158 (3rd Cir. 1941), where the Court of Appeals sustained a Commission order proscribing the use of certain words in a trade name, even though it was clear that a number of different companies had long been using variations of the word.

In short, taking into account the three principles enunciated by decisions of this Court, *supra* pp. 21-22, as well as the established course of remedial treatment of comparable problems by the Federal Trade Commission for at least three decades, the propriety of the Board's order becomes apparent. Properly it found the cause of public confusion to have been the use of the word American. To eliminate that cause it

forbade use of that word. It cannot be said that the Board failed to make an "allowable judgment in its choice of remedy." *Jacob Siegel* v. *Federal Trade Commission*, 327 U. S. 608, 612 (1946). Moreover, the judgment of the Civil Aeronautics Board is entitled to even greater weight than is that of the Trade Commission in a case under Section 5 of the Trade Commission Act, for, as this Court emphasized in its previous decision in this case, whereas Section 5 "is concerned with purely private business enterprises which cover the full spectrum of economic activity," the Civil Aeronautics Act has committed the regulation of the air transport industry, peculiarly affected with a public interest, "to an administrative agency of special competence that deals only with the problems of the industry." 351 U. S. at 83, 84.

The importance of setting this matter right far transcends what is immediately involved in this case, even taking into account that this case involves the protection of the public on the nation's main transcontinental air route. Since the war, the Board's decisions have greatly intensified competition throughout the airline network and have authorized scores of new air carriers to engage in a multitude of services. Some carriers, called "supplemental carriers," range at will throughout the nation with special operations. Others are held to fixed routes. Some provide special categories of service—such as freight service or air tours. Others provide combination services. Freight forwarders have sprung up by the dozens. Hundreds of agents have become active in the passenger field, advertising and dealing with the public in virtually the same way as do the airlines themselves. And classes of service have steadily multiplied: first class,

coach, combination, excursion, family plan, charter; air express, ordinary freight, deferred freight. The whole process of informing the public of air services with reasonable accuracy has become incalculably more complex with burgeoning tariffs and timetables, with increasing layers of competition, with routes and authorized territory changing sometimes almost monthly. Nothing in the history of surface transportation compares with this dynamic maze.

At the very heart of the problem of informing the public is the matter of carrier name-identity. Even while this case has been pending, name problems in various forms have arisen in at least six other Board proceedings[1] and a whole cluster of such problems remains to be resolved in one of these cases still in process.[2] Nor are name problems the only ones emerging in the field of trade practices. Already a far-reaching question as to practices in the advertising of schedules has come to the fore[3]—illustrative of the kind of stress which increasing competition for patronage inevitably creates.

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[1] See the following C.A.B. orders: E-10738, November 2, 1956; E-10380, June 15, 1956; E-9744, November 15, 1955, Mimeo. Opinion, p. 31 and E-9884, December 29, 1955, Mimeo. Opinion, pp. 20-21; E-9676, October 20, 1955; E-9388, July 14, 1955; E-8470, June 24, 1954.

[2] Order No. E-9884, December 29, 1955, Mimeo. Opinion, pp. 20-21.

[3] Flight Schedules of Certificated Air Carriers, C.A.B. Economic Regulations Draft Releases No. 80, April 11, 1956, and No. 80A, May 2, 1956. The question in this proceeding is that of requiring that advertised schedules reflect actual performance with reasonable accuracy. This Court's prior decision in this case has been relied upon by several of the interested parties in their discussion of the action that should be taken by the Board. See, *e.g.*, memorandum submitted by counsel for the Air Line Pilots Association at the oral argument, pp. 3-4, included in the docket.

In the public interest there has to be coherent regulation of this complex; the law of the jungle would invite chaos. But the judge-made private law of unfair competition, with limited reach and with edicts varying from court to court, would not be satisfactory either to the patron or to the supplier of service. Nor could the Federal Trade Commission, with its general jurisdiction, do the job effectively. The rules of fair practice have to be laid down in the context of intimate and continuing experience nation-wide. With notable prescience, Congress saw this need and so transferred jurisdiction over trade practices of air carriers from the Federal Trade Commission to the newly created Civil Aeronautics Board when the Civil Aeronautics Act was adopted, and later added travel agents to the Board's responsibilities.[4]

In its original opinion in this case, the lower court—which is the most important of the Courts of Appeals as a reviewer of the Board's action because most frequently invoked—turned the clock back to the 1920's in its treatment of the Board's substantive jurisdiction. Its opinion reflected a preoccupation with principles of common law unfair competition and a hostile attitude toward agency judgment of the public's interest. This Court's opinion, reversing the lower court, strongly reaffirms the doctrines of the Court's modern decisions on the extent of agency substantive jurisdiction over statutory unfair practices.

But, on the remand, the lower court, persisting in mixing up private law doctrines with the law of statutory unfair practices, now casts a dark shadow over

[4] 52 Stat. 1003 (1938), as amended, 66 Stat. 628 (1952), 49 U.S.C. § 491.

the agency's freedom to fashion remedy to violation. A remedial pattern long established by the Federal Trade Commission in this type of case is summarily rejected, and no recognition is given to this Court's settled principles which emphasize the leeway that an agency must have in determining the remedy to be applied when violation is found. That the lower court has raised an objection, *sua sponte*, never even remotely advanced before the agency itself, more than two and a half years after the case was finally disposed of by the agency, serves but to underline the gravity of the precedent set. The efficacy of the broad substantive jurisdiction which Congress intended can be largely defeated if narrowing judge-made restraints, drawn from a court's conception of the private law of unfair competition, are to be imposed upon the agency in its choice of remedy.

CONCLUSION

Decisions of the Court of Appeals for the District of Columbia Circuit on matters of administrative practice have a special importance because that court is so frequently called upon to review agency orders. Hence, the diligent administrative practitioner looks closely to those decisions for guidance in the conduct of the administrative case and in the formulation of exceptions and of proposals for agency action. Here, that court either has ignored or has cut a large hole in what, heretofore, had been a clear requirement that grounds of objection be stated to the agency and that wide scope be allowed for agency judgment in formulating remedial orders for the benefit of the public. The decision cannot be reconciled with this Court's precedents and with a number of decisions in other

Circuits. Hence, if permitted to stand, it can only breed confusion and doubt—certainly with respect to the Board's practice, and also with respect to that of the Trade Commission and other agencies. Therefore, the writ should be granted and, at the same time, the judgment below, insofar as it sets aside the Board's order, should be reversed.

The several applicable precedents in this Court's decisions are clearly inconsistent with the lower court's action. There is every reason for continued adherence to those precedents. Accordingly, the writ should be granted and at the same time the judgment below, insofar as it sets aside the Board's order, should be reversed.

Respectfully submitted,

HOWARD C. WESTWOOD

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Attorneys for Petitioner

December 17, 1956

COVINGTON & BURLING
Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12041

NORTH AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT,
AMERICAN AIRLINES, INC., INTERVENOR

On Remand from the Supreme Court of the United States

Decided July 12, 1956

Before PRETTYMAN, FAHY and DANAHER, *Circuit Judges*.

PER CURIAM: This case is before us now on remand from the Supreme Court, *American Airlines* v. *North American Airlines*, 351 U.S. 79. In the light of the decision of the Supreme Court we hold that upon consideration of the record as a whole the finding of the Board that the use by petitioner of the name "North American Airlines, Inc.," "North American Airlines," or "North American," causes substantial public confusion which is likely to continue, is supported by the evidence. We accordingly affirm the order of the Board insofar as it denies the application of petitioner for authority to engage in air transportation under the name North American Airlines, Inc., and orders them to cease and desist from engaging in air transportation under the names North American Airlines, Inc., North American Airlines,

or North American. But the evidence does not support the finding of the Board that the term "American" had acquired a secondary meaning before petitioner incorporated that term in its name or changed its corporate name, or the finding that such secondary meaning continues to exist. Accordingly, we set aside the order of the Board insofar as it orders petitioner to cease and desist engaging in air transportation under any other name which includes the word "American."

In view of the foregoing and because of the representations made to us by motion of intervenor, American Airlines, Inc., that during the pendency of the remand petitioner has abandoned the use of the name North American Airlines, Inc., and is now using the name "Trans American Airlines," the case will be remanded to the Board for such further proceedings as it may be advised, and as are consistent with this opinion.

It is so ordered.

E-7870

UNITED STATES OF AMERICA CIVIL AERONAUTICS BOARD

Washington, D. C.

Served: Nov 4 1953

Docket Nos. 5774 and 5928

North American Airlines Section 411 Proceeding

Decided: November 4, 1953

North American Airlines, Inc. (Twentieth Century Airlines, Inc.) ordered to cease and desist from engaging in air transportation under the names "North American", "North American Airlines", "North American Airlines, Inc.", or any combination using the word "American"

Appearances:

Hardy K. Maclay and Walter D. Hansen for North American Airlines, Inc:

Howard C. Westwood, Ernest W. Jennes and Clifton J. Stratton, Jr., for American Airlines, Inc.
Robert M. Johnson, Enforcement Attorney.

OPINION

By the Board:

This proceeding involves an investigation instituted by the Board to determine whether North American Airlines, Inc., formerly Twentieth Century Airlines, Inc. (respondent) has been and is violating Section 411 of the Act by engaging in air transportation under the name North American Airlines, Inc., North American Airlines, or North American.[1] The order instituting the investigation consolidated into it an application by respondent, filed under section 291.28 of the Economic Regulations, for authority to conduct its operations under the name North American Airlines, Inc., rather than as Twentieth Century Airlines, Inc., the name in which respondent holds its letter of registration as a large irregular air carrier. American Airlines, Inc. (American) was granted leave to intervene.[2]

After due notice a public hearing was held before Examiner Walter W. Bryan who has issued his Initial Decision. In it he found (a) that respondent's use of the name North American Airlines, Inc., North American Airlines, North American, or any combination of the word American constitutes an unfair or deceptive practice and an unfair method of competition within the meaning of section 411 of the Act, (b) that the public interest requires denial of respondent's application to engage in air transportation under the name North American Airlines, Inc., and (c) that respondent, its successors, assignees, representatives, agents, officers and employees should be ordered to cease

[1] Order No. E-7107, dated January 28, 1953.

[2] Order No. E-7174, dated February 19, 1953.

and desist from engaging in air transportation under the name North American Airlines, Inc., North American Airlines, North American, or any combination of the word American. Respondent has excepted to the Initial Decision.[3] The Board has heard oral argument, and the case now stands submitted for decision.

Upon consideration of the entire record, we agree with the Examiner's ultimate findings as set forth above. Those portions of his Initial Decision which we adopt as our own are attached hereto as an appendix. We shall discuss herein some of the contentions raised in respondent's exceptions, and in so doing we shall supplement the findings and conclusions contained in the appendix.

1. Respondent presents several exceptions attacking the sufficiency of the evidence of record to establish that respondent has caused substantial public confusion between itself and intervenor by using the names North American, North American Airlines, or North American Airlines, Inc. The Examiner found that such confusion exists by reason of the similarity between North American and the word American as used by intervenor. We concur in this finding. In addition, we find that substantial public confusion exists due to similarity between respondent's names and the name American Airlines. Evidence supporting these findings is partially summarized in the appendix. We have examined the evidence in the light of respondent's attacks upon both its weight and its admissibility, as discussed below, and have determined that the record amply supports our findings.

Respondent assails both the admissibility and the weight of evidence of confusion introduced in the form of written

[3] Respondent has filed a brief in support of its exceptions. American filed a statement in lieu of exceptions approving the Examiner's ultimate findings, with a brief to the Board in support of its position. Counsel for the Board's Office of Enforcement filed no exceptions but requested the Board to consider his brief to the Examiner.

statements by certain American reservations and ticket office employees who were not called as witnesses. It is true that virtually all of the evidence of public confusion in the Chicago area is of this nature. But the finding of substantial confusion is required by the abundant testimony and written statements as to public confusion in the New York and Los Angeles areas personally observed by at least seven[4] witnesses who were extensively cross-examined upon their testimony and statements. In finding substantial public confusion, we do not depend or rely upon the corroborative value of the evidence respondent thus assails. Indeed, all our findings and conclusions in this proceeding are based only upon evidence given by persons appearing as witnesses and available for cross-examination.

2. Respondent contends that the Examiner improperly relied upon evidence of confusion on the part of persons who were not shown to have been prospective buyers of air transportation at the time they evinced confusion. Such evidence related to attempts of merchants, hotels, and others to hold American Airlines answerable for the obligations or acts of respondent. Respondent views our inquiry as confined to the question of whether *shoppers for air travel* will be confused, and asserts that such confusion is not established by the evidence in question.

Even assuming that our concern is directed only to confusion of prospective passengers,[5] evidence of confusion of members of the public not so identified does not lack probative force. There is no reason to believe that those who

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[4] Witnesses Newkirk, Perry, Rowley, Avery, Heide, Houck and Reynolds; also witness Burg.

[5] Obviously the public to whose interests we must look herein does not consist solely of individuals contemplating purchase of air transportation. For example, the record shows that a person whose sole transportation interests at the time may lie in the journey of another can experience considerable inconvenience if under a misapprehension as to the carrier's identity and time and place of arrival.

as creditors confused respondent with intervenor are more prone to such confusion than prospective air travellers. The evidence here challenged by respondent corroborates the direct evidence of confusion on the part of the travelling public. Indeed, such creditors may be themselves prospective air travellers.

3. The bulk of the confusion shown in the record was on the part of persons reasonably identified as prospective or actual purchasers of air transportation. In attacking this evidence, respondent argues that the showing of confusion due to similarity of names actually represented confusion which the witnesses had imputed to, rather than observed in, the public. Respondent claims that the public behavior observed by these witnesses, properly interpreted, indicates either (a) no confusion on the part of the traveller or caller at all, or (b) confusion involving some carrier other than respondent, or (c) confusion between respondent and intervenor not attributable to a similarity of names.

(a) The record contains few instances where it would be reasonable to conclude that the caller was not confused at all. Respondent would so describe persons who presumably were trying to telephone respondent but who in fact telephoned American possibly because of a wrong number. But absent a showing of a confusion due to similarity of telephone numbers, receipt by American of telephone calls intended for North American is itself some evidence of a confusion due to similarity of names. Respondent also regards as not confused persons who apparently called American intentionally and who, according to respondent, did so merely because they regarded American as a good source of desired information. While there is no dispute that such calls are received by American, very few of the instances described by the witnesses were even arguably of this nature.[6] The evidence as a whole is

[6] This finding is made with full cognizance of certain evidence in the record showing that intervenor does receive general inquiries regarding air transportation where there is no confusion. Respondent improperly attempts to classify as inquiries of this character requests which we conclude involve confusion.

convincing that in almost all instances offered to show confusion of the public, confusion was definitely or very probably present.

(b) In certain instances respondent does not deny that confusion may have been present, but argues that the caller or traveller whom the witness observed may have confused American with some air carrier other than North American. This argument is inapplicable to a major portion of the cases reported by the witnesses, because the conduct of the persons observed directly exhibited that North American was involved. The argument is unpersuasive in other instances which were indirectly linked to North American by references to North American flight numbers or advertising, including in one case the name of a radio entertainer sponsored by respondent. It is true that the link to respondent is imperfect where it consisted merely in references by the caller to special fares, particular destinations and distinctive features of service shared by carriers other than respondent. However, such cases are overshadowed by the evidence in which North American's role in the confusion is obvious.

(c) Respondent disputes the causal relationship between the similarity of names and the public confusion between the carriers using such names. Respondent cannot successfully challenge such a relationship on this record. That there is in fact a similarity between the names of respondent and intervenor is obvious, and where the evidence shows members of the public have confused respondent with intervenor, the implication is strong that such confusion flows from the similarity. The record will not permit us to draw a contrary inference. It has not been shown that comparable public confusion exists between intervenor and a carrier with a clearly dissimilar name, nor between respondent and a carrier with a clearly dissimilar name. Moreover, respondent is unable to point to any prevailing circumstance more likely than the similarity of the parties' names to account for the confusion between itself and intervenor. In

one case, in which a letter addressed to American Airlines at the Lockheed Air Terminal in Burbank, California, was misdelivered to respondent's counter at the same terminal, respondent urges as the probable reason that the letter bearing the name of an American Airlines' employee, Miss Newkirk, beneath that of American Airlines, was misdelivered because respondent also had an employee named Newkirk. But this single instance affords respondent little aid in view of the evidence that there were other instances of letters both misdelivered and misaddressed as between American Airlines and North American. In these cases there was no evidence of similar personal names, and the conclusion that the similarity in the carriers' names was the causal factor can hardly be avoided.

4. Respondent contends that any instances which may show a confusing similarity of names are too few to support a finding that such confusion is substantial or widespread. Respondent attacks a statement of the Examiner that it would be reasonable to assume on the basis of the evidence that American Airlines' personnel in the Los Angeles area receive 200 inquiries a week involving confusion on the part of the public. Respondent asserts that the evidence shows there were 8 instances a week of allegedly confusing inquiries received by American Airlines in that area, including only one which respondent concedes may have in fact involved actual confusion due to similar names. Respondent thus contends that any confusion caused by the similarity of names is *de minimis*.

The fact is that such confusion has been shown by the evidence of record to be substantial. We need not determine whether to endorse the precise numerical estimate of the Examiner, but we must reject respondent's assertion that American Airlines' Los Angeles personnel received only 8 inquiries per week involving confusion. That figure refers to certain reports by American Airlines' personnel committed to writing under the instructions of their super-

visor who testified that for some time past instances of confusion with respondent had been frequently brought to his attention by his subordinates. He also testified that the reports, including those made by other witnesses, were representative of such instances; that some reports which he did not consider completely illustrative of the problem were discarded; that the instructions did not call for reporting all instances as that would have been an impossibility, since the personnel in question were busy answering telephones and handling many customers; and that his instructions called for reports of specific instances of unusual confusion or of a particular type of confusion which had happened repeatedly. The testimony of the American Airlines' ticket counter and telephone reservation personnel in Los Angeles and New York indicates the frequency of the confusion, or of one particular type of confusion, observed by individual witnesses as daily, practically daily on the night shift, three or four times a week, five or six in a five-day week, three or more a week, etc. Such indications are cumulative rather than duplicative as to number, and since the witnesses testified as to observations made in work performed by them as a part of a much larger force also so occupied, their observations can be taken to represent only a small part of such occurrences. This is confirmed by the testimony of American's supervisory witnesses from New York and Los Angeles, that public confusion involving respondent had come to their attention for some time as a problem which they encountered as supervisors.

5. Respondent has taken the position that, apart from the question of confusion, we cannot find a violation of section 411 herein because the word American as used by intervenor in air transportation did not acquire a secondary meaning referring to intervenor. We concur in the Examiner's finding and conclusion to the contrary. The evidence establishes that intervenor has long engaged in extensive advertising of its services in the name of "American".

This practice has helped to instill in the minds of the public the notion that the word "American" when used in connection with domestic air transportation denotes American Airlines. This is dramatically illustrated by the fact that intervenor has been and is commonly referred to in news items in the public press as American. Where, as here, the record shows that the public press identifies "American" with the intervenor, and believes that the reading public makes the same identification, we find strong evidence of secondary meaning in the word "American."

In finding the secondary meaning, we have not overlooked the recent use of the word American in the name of the sectional local service carrier All American Airways, which has since changed its name to Allegheny Airlines. Nor have we overlooked the recent use of the word American in the name of the irregular carrier Air America, against whom an enforcement proceeding[7] involving its name is now pending before us. We have also considered the use of American in the name Pan American World Airways. There, the use occurred in the separate field of international and overseas air transportation, from which intervenor is wholly excluded except to the extent of serving Mexico City. The fact that intervenor in its long history of extensive advertising may have, at times, emphasized the word "flagship" more than it emphasized its name does not destroy the continuity of its use of that name. There is no doubt that the word American, used in connection with domestic air transportation, is widely known as meaning the intervenor, and that the phrase American Airlines is also understood to refer to intervenor and not to denote the airlines of this nation or continent generally.

Even if respondent were correct in its arguments as to secondary meaning, we do not interpret section 411 so that respondent would prevail. We do not believe that in a case like the present, secondary meaning must be proven in

[7] Docket No. 6078.

order to protect the public against a clearly demonstrated and substantial public confusion. And, this is certainly true where, as here, respondent has adopted a corporate name confusingly similar to the earlier adopted corporate name "American Airlines."

Respondent asserts that its use of its name has not been shown to have been fraudulent. Respondent did not commence and develop its operations as North American Airlines under circumstances of time, place, or nature and scale of operations in which confusion with intervenor would have seemed a remote prospect, but rather changed its name from Twentieth Century Airlines to North American Airlines at a time when American Airlines was universally known in air transportation circles and when operations between major cities served by American must have loomed large in respondent's contemplation of its future activities. Under the circumstances, it was obvious that the similarity of names might well cause confusion. Respondent must be presumed to have intended the reasonably foreseeable consequences of its own acts. We find that respondent's use of a confusingly similar name was not accidental or inadvertent, but rather was knowing.*

We are well aware that an order requiring respondent to cease and desist using the name under which it has been engaging in air transportation is a serious sanction which

*There is some evidence which, literally read, would support a finding that respondent used its name in order to secure for itself prospective passengers of intervenor. Moreover, there is other evidence, introduced by respondent, clearly showing the regular use by respondent of misleading advertising concerning itself. This evidence shows that respondent's radio commercials regularly contain the words "North American one of the nation's four great airlines". Clearly the word great, used to describe a commercial enterprise such as an airline, would normally be understood in its usual sense of big or large. By no objective criteria is the quoted claim, so interpreted, even close to being true of respondent. American Airlines, however, by most if not all tests of size is in fact one of the four largest domestic air carriers, a group commonly referred to as the "Big Four".

necessarily involves disturbance and loss to the carrier. We do not impose such a measure lightly. But the record is convincing that the public interest requires this action in order to prevent further public confusion between respondent and intervenor due to similarity of names. The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air. The speed of air travel may well be diminished when passengers check in for flights with the wrong carrier, or attempt to retrieve baggage from the wrong carrier, or attempt to purchase transportation from the wrong carrier, or direct their inquiries to the wrong carrier. Friends, relatives or business associates planning to meet passengers or seeking information on delayed arrivals are subject to annoyance or worse when confused as to the carrier involved. The proper handling of complaints from members of the public is impeded by confusion as to the carrier to whom the complaint should be presented. The transportation itself may differ from what the confused purchaser had anticipated (e.g., in terms of equipment), even though the time and place of arrival may be about the same. It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest, and we have determined that the public should be protected from the effects of the confusion shown on the record by eliminating what we find to be the cause of such confusion.[9]

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[9] Respondent cites certain orders issued in Docket No. 4776 (Ralph Cox, Jr. d/b/a Ocean Air Tradeways) as a precedent under section 411 to the effect that actual injury to the intervenor must be shown before the Board can act under that section. We do not so read these orders (Nos. E-4990 of December 29, 1950, E-5897 of November 28, 1951, and E-6778 of September 10, 1952), for it appears that the complainant in that case, Overseas National Airlines, proceeded on a claim of purely private rights but failed to allege facts showing any injury from violation of such rights. Furthermore, substantially all of the business of the other carrier,

We have considered the remaining contentions of respondent in support of its exceptions and find them without merit.[10]

Respondent also excepts to the Examiner's statement that the courts have consistently upheld the public interest as being the foremost issue in cases involving violation of trade-marks and have granted injunctive relief without proof of fraud, deception or injury to the owner of the trade-mark. We have not adopted the Examiner's statement and accordingly need not comment further on that subject.

Accordingly, in view of the foregoing and upon consideration of the entire record we find:

United States Overseas Airlines, was under contracts with the military establishment, rather than with the general public. These orders by no means imply that where the public interest may be adversely affected by a confusing similarity of names the Board before acting under section 411 will require a showing of actual injury to the private complainant who asserts a right in such a name.

[10] Respondent excepts to the Examiner's statement that the issues herein include the question of whether granting respondent's application for leave to change its name to North American Airlines, Inc., would be contrary to the public interest. Respondent asserts that under the order instituting the investigation the sole issue was stated to be the violation of section 411 by the use of the name North American, etc., that this delineation of the issues was reaffirmed both in an order denying intervenor's motion to clarify and broaden the issues and in the prehearing conference report, and that the Examiner's addition of a new issue after hearing deprived respondent of notice. There is no doubt that respondent's application was consolidated herein by the order initiating the investigation under section 411 (No. E-7107 of January 28, 1953) and was referred to as such in the prehearing conference report. However, we agree with respondent that the only issue in this proceeding is whether there has been a violation of section 411. For, under the regulation regarding change of name under which respondent's application was filed, as interpreted by the order initiating the investigation mentioned above, a denial of the application may be ordered only if a violation of section 411 is shown. Thus the issues under respondent's application and the Board's order of investigation herein are identical.

1. That American Airlines and North American Airlines are in competition in air transportation;

2. That American Airlines was incorporated under that name before North American adopted the trade name of, or changed its corporate name to, North American Airlines; that the term "American" had acquired a secondary meaning before North American adopted that trade name or so changed its corporate name, and such secondary meaning continues to exist;

3. That the substantial public confusion found herein is likely to continue;

4. That the use by respondent of the name "North American Airlines, Inc.", "North American Airlines", "North American", or any combination of the word "American" constitutes an unfair or deceptive practice and an unfair method of competition within the meaning of Section 411 of the Act;

5. That the public interest requires that the application of respondent, Docket No. 5774, for authority to engage in air transportation under the name North American Airlines, Inc., be denied;

6. That respondent and its successors, assignees, representatives, agents, officers, and employees should be ordered to cease and desist from engaging in air transportation under the name "North American Airlines, Inc.", "North American", or any combination of the word "American".

An appropriate order will be entered.

Ryan, Chairman, Denny, Vice Chairman, Lee and Gurney, Members of the Board, concurred in the above opinion. Adams, Member, filed the attached dissenting opinion.

Adams, Member Dissenting:

I dissent from the action taken by the majority since I do not agree with their application to this case of the law of unfair competition nor with the particular sanc-

tion they have imposed upon North American Airlines, Inc. I feel that neither our Office of Enforcement nor the intervenor, American Airlines, Inc., has successfully borne the burden of proving the existence of unfair competition since in my view, although some public confusion has been demonstrated, I do not agree that it is substantial, or more than temporary.

As I read the leading cases on the subject of unfair competition, I feel that the error made by both the examiner and the majority arises from their tendency, on the one hand, to ignore the basic common law of competition and that of secondary meaning; while on the other hand they over emphasize the gullibility of the average purchaser in this country and magnify the significance and degree of public confusion shown on the record of this case. With this as a basis, the majority concludes that the name "American" has acquired a secondary meaning in the public mind, denoting only American Airlines, Inc.; that substantial public confusion exists and is likely to continue; and that, therefore, American Airlines, Inc., must be protected from the use by respondent, North American Airlines, Inc., of the word "American" as any part of its business name.

Since American Airlines, Inc., carries approximately 5½ million passengers each year over its system, I am not impressed with the fact that witnesses in this case (principally those employed by American Airlines itself) have testified that some confusion has existed between the services offered by American, on the one hand, and North American on the other. On the contrary, I would be greatly surprised, (in view of the several million phone calls and other communications which American Airlines receives every year over and above those received from passengers which it actually carries) if there were not *some* demonstrable public confusion between American Airlines and the respondent in this case. As I read the law, however, a new "competitor" is not required to insure against any and all

confusion which its entry into the field may cause to certain uninformed purchasers.

When considered in the light of the facts before us in this case, the following excerpts from court decisions bearing on the matter of public confusion and the extent of that confusion required to support injunctive relief are pertinent:

> "The issue in such a case as this is 'whether an appreciable number of prospective purchasers of the goods . . . are likely' to be confused. 'That a few particularly undiscerning prospective purchasers might be so misled is not enough.' "
>
> *Eastern Wine Corp.* v. *Winslow Warren Ltd., Inc.*, 137 F. 2d 955, 960 (1943).

In the *Life Savers Corp. Case*,[1] just as in the case before us, some confusion was actually shown. The Circuit Court, however, quoted the trial court and agreed " . . . it is just as probable that the confusion can be attributed to the size and shapes of the various packages as to the exact wording and coloring of the labels". In that same case, in view of the tremendous volume of sales the court said, "It would be extraordinary if some confusion could not be found irrespective of the details of the dress of the package".

Although both the examiner and the intervenor here have cited the *Florence Manufacturing Case*[2] and the language therein to the general effect that the ignorant, unthinking and credulous public must be protected by the law of unfair competition, other authoritative cases take a different view. The *same court* which decided the *Florence Case* had the following to say 33 years later on the matter of unduly protecting the interest of the businessman:

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[1] *Life Savers Corp.* v. *Curtiss Candy Co.*, 182 F2d 4, 8 (1950).

[2] *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 F. 73 (1910).

"The failure to keep constantly in mind the divers policy considerations which, in this legal province, come in conflict with one another and the consequent occasional over-emphasis on but one of them—the protection of the interest of the businessman who has built a business around a name—has sometimes led to decisions unduly extending the confines of name-monopolies. For a time the courts were remarkably generous in fixing the boundaries of such monopolies. *Today the tendency is to be somewhat less generous.* (*Durable Toy & Novelty Corp.* v. *J. Chein & Co.* 133 F2d 853, 1943) *We approached the case at bar then, having in mind the basic common law policy of encouraging competition and the fact that the protection of monopolies in names is but a secondary and limiting policy.*" (Emphasis added.)

Eastern Wine Corp. v. *Winslow-Warren Ltd., Inc.*, 137 F2d 955, 959 (1943).

In 1943 a District Court in Nebraska had this to say on the matter of the obligation of a new competitor toward the non-discriminating public:

"Upon this branch of the case the law is settled that competition is not forbidden but rather unfairness in competition and that the essence of actionable unfairness in competition is the creation by one come newly into a competitive field of a situation that is reasonably calculated to result in the passing off of his goods as those of his competing predecessor in the market. Again, *the new competitor is not held to the obligation of an insurer against some confusion*, but is required only to use reasonable care to inform the public of the source of his product, to use every reasonable means to prevent confusion. *Pointedly, he is not obliged so to guard his competitive methods that even the negligent or inattentive purchaser will be protected from confusion. As the cases in some instances have put it,*

> *he is not required to make the market 'fool proof'." Skinner Mfg. Co.* v. *General Foods Sales Co.*, 52 Fed. Supp. 432, 450 (194). (Emphasis added)

The thorough-going analysis of the law made by the District Court in this case was commented upon with approval by the Circuit Court on appeal[3] and certiorari was denied by the Supreme Court of the United States. Even more recently, in 1950, the Court of Appeals for the 7th Circuit made this pertinent observation:

> "A new competitor is not held to the obligations of an insurer against all possible confusion. *He is not obligated to protect the negligent and inattentive purchaser from confusion resulting from indifference* . . . In *Fruit Growers Co-op.*, 170 F2d 834 at page 837, this court said: '. . . Instead they are required only to mark or designate them in such manner that purchasers exercising ordinary care to discover whose products they are buying will know the truth and not become confused or mistaken . . .' " *Life Savers Corp.* v. *Curtiss Candy Co.*, 182 F2d 4, 8 (1950). (Emphasis added.)

In light of the foregoing authorities and many others cited in Respondent's briefs and exceptions (and not mentioned either by the examiner or the majority), I conclude that the public confusion or the likelihood of its continuance established in this record is not such that this Board should enjoin Respondent from continued use of its corporate name on the grounds of unfair competition.

Aside from the foregoing difficulties which I have relative to the findings of public confusion in this case, I must also differ with the finding as to secondary meaning made by both the examiner and the majority. This legal doctrine has been clearly defined in several cases, but in no case

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[3] *Skinner Manufacturing Co.* v. *Kellogg Sales Co.*, 143 F2d 895 (1944) Cert. Denied, 323 U. S. 766.

do I find that it has been applied to protect the user of a geographical name such as "American", where that user was neither the first nor the exclusive user. As shown by this record, of course, American Airlines can claim to be neither the first nor the exclusive user.

I have carefully examined the thirteen cases upon which the examiner and the majority rely for the finding that the term "American" when applied to air transportation has taken on a secondary meaning so that a new airline must not be allowed to use the term as any part of its business name. In every one of the cases cited the plaintiff prevails under this theory of secondary meaning because *without exception the plaintiff was both the first and sole user of the name involved.*[4] Furthermore, in eleven of the thirteen cases the name sought to be used by the new competitor was either identical to that of the first and exclusive user or sounded identical thereto or differed therefrom only by the omission of one letter (viz., "Finchley" as the original name compared with "Finchly" used by the new competitor in the *Finchely Case*). Also in many of the

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[4] *Hudson Tire Co., Inc.* v. *Hudson Tire & Rubber Corporation et al.*, 276 Fed. 59 (1921).
Standard Paint Co., v. *Rubberoid Roofing Co., et al.*, 224 Fed. 695 (1915)
American Products Co., v. *American Products Co.*, 42 F2d 488 (1930).
American Radio Stores, Inc., v. *American Radio and Television Stores Corp.*, 150 A. 180 (1930).
Delaware L. & W. R. Co. v. *Lackawanna Motor Freight Lines*, 175 Atl. 905 (1934).
Barton et al., v. *Rex-oil Co., Inc.* 2 F2d 402 (1924).
American Thread Co. v. *North American Thread Co., Inc.*, 33 Fed. Supp. 616 (1935).
Womble v. *Parker*, 67 S.E. 2d 133 (1951).
Phillips v. *The Governor & Co. of Adventurers of England trading into Hudson Bay*, 79 F2d 971 (1935).
Lincoln Motor Co., et al., v. *Lincoln Automobile Co.*, 44 F2d 812 (1930).
Finchley, Inc., v. *Finchly Co., Inc.*, 40 F2d 736 (1929).
Western Auto Supply Co., v. *Knox*, 93 F2d 850 (1937).
Thomas A. Edison, Inc., v. *Shetkin*, 69 Fed. Supp. 176 (1946).

cases cited by the examiner, the courts made specific findings that the second user of the name involved had adopted it with the willful and fraudulent intent to deceive the public (*Standard Paint Case, Barton Case, Delaware and Lackawanna Case, and Finchley Case*)—whereas in the case now before us the examiner made no such finding but, in fact, found that "There is no evidence of record that North American adopted its name with intent to deceive the public or trade upon the good will and business reputation of American."[5]

In other cases cited by the examiner in support of his finding of secondary meaning the courts found, as a matter of fact, truly substantial evidence not only of public deception, but also of actual injury to the trade or profits of the plaintiff. (*Barton Case, American Radio Stores Case* and the *Womble Case.*) On this point also the examiner in the case now before the Board has specifically found *no evidence* that American has been injured by North American's operation.

In light of the foregoing distinguishing features of the cases cited from the facts in the present record, I cannot agree that American Airlines has established a secondary meaning in the term "American" when applied to air transportation such as to give that carrier an "exclusive" property right to the name or such as to require North American Airlines to be enjoined from further use of that term in its name.

In light of what I have said earlier concerning my differences with the majority on the extent of public confusion actually proven here, I must also dissent from their finding that the similarity of the two names, American Airlines, Inc., and North American Airlines, Inc., is so great as to require us in the public interest to enjoin North American from further use of its corporate name. Although it is not clear from the majority opinion itself whether the

[5] Examiner's Report, page 15.

finding as to similarity in names is based on evidence of public confusion; or merely upon the comparison of the two names in the minds of the majority without reference to public confusion, I must dissent from their finding on whichever basis the finding of similarity is made.

Finally, even if I did not have the foregoing difficulty with the majority's findings of public confusion and secondary meaning, I would nevertheless have to take this occasion to question seriously the wisdom of the sanction imposed by the majority in this case which, in effect, absolutely prohibits North American Airlines from using the name "American" in any way in its business name. The effect of this prohibition, or course, is to nullify the efforts which that carrier has made and the substantial sums of money which it has expended in building up public good will under that name. I have difficulty in minimizing these serious consequences by simply finding, as the majority does, that North American must be prepared to accept the reasonable consequences of its adoption of its name. Rather than insist on the absolute prohibition against continued use of its name, it would seem reasonable to me that American would be amply protected if North American were required to make more clear in its advertisements and contact with the public that it is not to be confused with American Airlines. This could be done, it seems to me, in any one of several ways, but regardless of the method used, North American would be enabled to capitalize upon the good will which it has engendered since 1951 under its corporate name.[6]

(s) JOSEPH P. ADAMS.

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[6] Support for this type of relief rather than that decided upon by the majority is found in several cases including *Singer Manufacturing Company* v. *Bent* 163 U. S. 205, and *French Republic* v. *Saratoga Vichy Company*, 191 U. S. 427.

Appendix
[to Board's Decision]

Excerpts From the Initial Decision of Walter W. Bryan, Examiner in the North American Airlines, Inc., case Docket Nos. 5774 and 5928

This proceeding arises as the result of the Board's order serial No. E-7107, dated January 28, 1953, in which it is ordered that an investigation be instituted to determine whether North American Airlines, Inc., formerly Twentieth Century Air Lines, Inc., in engaging in air transportation under the name of North American Airlines, Inc., North American Airlines, or North American, has been and is engaging in activities and practices in violation of section 411 of the Act, and if any such violation is established, whether the Board should issue an order directing North American to cease and desist from such violations.

It is indicated in the record that on March 11, 1952, Twentieth Century Air Lines, Inc. (Twentieth Century) advised the Board that the corporate name of Twentieth Century had been changed to North American Airlines, Inc., (North American) effective March 3, 1952, and it requested the Board to change its records accordingly and reissue its letter of registration in the new name.

On August 19, 1952, the Board adopted an amendment No. 7 to Part 291 of its Economic Regulations, effective September 23, 1952. The above amendment added a new section, 291.28, *Business Name of Air Carrier*, which provided:

> "On and after November 15, 1952, it shall be an express condition upon the operating authority granted by this Part and the letters of registration issued hereunder that the air carrier concerned, in holding out to the public and in performing air transportation services shall do so only in a name the use of which is authorized under the provisions of this section.

(a) Except as otherwise provided under paragraph (b) of this section, an air carrier may do business in the name in which its letter of registration is then issued and outstanding, including abbreviations, contractions, initial letters, or other minor variations of such name which are readily identifiable therewith.

(b) An air carrier may do business in such other and different name or names as the Board may by order permit, upon a finding that the use of such other name or names is not contrary to the public interest. Any such permission may be made conditional upon the abandonment of the use of the name in which its letter of registration is issued and outstanding, in air transportation service by the air carrier concerned, or otherwise be made subject to such reasonable terms and conditions as the Board may find necessary to protect the public interest."

On October 6, 1952, North American timely filed an application under the above regulation for authority to conduct its operations under the name North American Airlines, Inc., in lieu of Twentieth Century Air Lines, Inc. Upon consideration of this application the Board determined to institute the above described investigation and by its order consolidated the above application, Docket No. 5774, with the investigation proceeding, Docket No. 5928, for hearing and decision.

American Airlines, Inc., (American) was permitted to intervene and participated in the proceeding. A hearing has been held and all parties given an opportunity to file briefs with the Examiner.

Issues.—The issue involved here is whether North American has been or is engaged in unfair or deceptive practices, or unfair methods of competition in air transportation, within the meaning of section 411 of the Act, by the use of the name North American Airlines, Inc., North American

Airlines, or North American, and if any violation is established whether North American should be ordered to cease and desist therefrom; also whether the granting of the request in North American's application for leave to change its name to North American Airlines, Inc., would be contrary to the public interest.

Twentieth Century Airlines, Inc., was incorporated in North Carolina on May 4, 1946, and holds a letter of registration as a large irregular air carrier. On March 3, 1952, the above carrier amended its articles of incorporation so as to change its name to North American Airlines, Inc. Since on or about April 21, 1951, the above carrier has engaged in the air transportation of persons between, among other points, New York, Chicago, and Los Angeles, under the trade name of North American Airlines.

American Airlines, Inc., (American) the intervener in this proceeding, was incorporated in Delaware on April 11, 1934, succeeding American Airways, Inc., which was incorporated under the laws of Delaware on January 25, 1930. American has continuously engaged in air transportation of persons, property, and mail since the above dates and has operated between, among other places, New York, Chicago, and Los Angeles as a scheduled air carrier.

American registered on July 27, 1948, the name "American Airlines" under the Federal Trademark Act, 15 U.S.C. 1051 et seq., on the Principal Register (No. 514294) of the United States Patent Office as a service mark used in connection with the furnishing of air transportation.

Since 1934 American has concentrated in its advertising [on] the names "American" and "American Airlines" with the purpose of creating in the public mind an identity between the name American and its air transportation service. There were introduced in evidence samples of such advertising as ["American's Leading Airline"], ["Better by Air—Best by American"], "American to Detroit—the Most Frequent Service," "American to

Washington $98 via DC-6 Airtourist Service," "American to New York 11 Nonstop Flagships," and "American's Convairs Are Coming."

The above type of advertising has appeared weekly on 251 billboards and in 142 newspapers throughout the country with a combined circulation of approximately 28,000,000. American has spent in excess of $2,250,000 for the above type of advertising since 1949.

American has also advertised extensively in magazines and during the period between 1948 and 1952 it spent approximately $3,800,000 for such advertising. It also advertises in the various cities served by American by means of display signs appearing at airports and in other public places. In 1940 American produced a sales movie entitled "The American Way," which has been shown to groups throughout the country, depicting its service and the comfort, speed and convenience of air travel. American is currently spending on newspaper and billboard advertising approximately $600,000 annually.

An officer of American in testifying stated that in his opinion the extensive advertising of American service as being the leading airline in American air commerce had been accepted by the traveling public. He further stated that much of American's advertising is devoted to identifying American with a certain route structure and with a certain type of superior equipment.

The direct evidence of record consists of testimony of witnesses who, for the most part, are employed by American as ticket and reservation agents located at Los Angeles, Burbank, Chicago, and New York. There were also affidavits and written statements from ticket and reservation agents received in evidence for the purpose of establishing whether the names "American" or "American Airlines" and "North American" or "North American Airlines" are confusing to the traveling public.

The above evidence generally involved numerous inquiries on the part of the public made to American employees concerning service, rates, routes, and schedules of North American under the mistaken impression that North American and American were one and the same airline.

An officer of American testified that he had received from employees under his supervision numerous inquiries indicating confusion between American Airlines and North American Airlines, and that * * * his office had received a telephone call from a representative of a trade union, complaining that an American sign was being painted by non-union painters, and upon investigation it was found that the sign was that of North American. There were instances of air passengers holding North American tickets attempting to check in for North American flights at American ticket counters—in fact, at the Burbank office this was a daily occurrence—and many of the passengers were still confused after an explanation had been made that American and North American were two different airlines. There were instances where North American passengers attempted to claim their baggage at the American counter; also other instances where prospective passengers insisted they were entitled to a discount for transportation on American because they held a "Buyers League Script Book." Upon an investigation by the passengers making the inquiries, it was learned that it was North American instead of American which offered a discount.

There were other instances of persons meeting incoming North American passengers who made inquiries at the American ticket counter at Burbank to determine time of arrival. Other inquiries were made of American agents at Los Angeles concerning an $80 fare from Los Angeles to New York, which the persons had heard advertised on television, and upon investigation it was found that it was North American they were referring to and not American. One witness testified that she had heard people state that

they were under the impression that North American and American were the same or affiliated companies. Another witness for American testified that one person insisted that American flew from New York to Miami because she had heard a radio program to that effect, whereas the program in question was that of North American. There were instances where mail addressed to North American was delivered to American Airlines' office. Tradesmen have dunned American for bills owed by North American and hotels have requested American's advice as to billing for hotel charges incurred by North American crews. A witness for American stated that at its Burbank office the president of North American, who is on duty at the North American ticket counter at Lockheed air terminal, informed her that many persons would stop at his counter and request tickets to Dallas, Oklahoma City, or Tulsa, points which North American did not serve, and he would realize that the passengers were confused and that they were under the impression it was American's ticket counter. The president further stated to the witness that if the passengers were destined to New York or Chicago he would do everything he could to "steal" them.

There were many other instances similar to those referred to above that need not be repeated here. In general, they indicate that certain confusion exists on the part of the public in distinguishing the services of the two airlines in question.

The witnesses who appeared and testified on behalf of North American were ticket agents from Burbank and Washington, D. C. Their testimony was to the effect that they had not experienced any great degree of confusion on the part of the public involving the similarity of names between American and North American. The agent at Burbank stated it was a common occurrence at his counter for persons to inquire about the services of other carriers such as United and particularly the services of North Star —in fact, the witness had noticed a certain amount of confusion existing on the part of the public between North

American and North Star. Another witness for North American stated that his experience had been that the majority of customers made inquiries concerning destinations of the various carriers and were not particularly confused about the similarity of names of the carriers.

Discussion.—Section 411 of the Civil Aeronautics Act empowers the Board to determine whether any air carrier or ticket agent has been engaged or is engaging in unfair or deceptive practices, or unfair methods of competition in air transportation or the sale thereof, and if such is found to exist the Board is empowered to order discontinuance of such practices.

* * * one must look for guidance to the decisions of the courts in their application of unfair trade practices as set forth under section 5 of the Federal Trade Commission Act, * * * The Federal Trade Commission has been given the jurisdiction by statute over unfair competition in the common law sense of the term and also under the statutory language as defined "any unfair method of competition or unfair or deceptive *act* or practice in commerce." It is noted that the word "act" in the Federal Trade Commission Act has been omitted in section 411 of the Civil Aeronautics Act.

The courts have said that the unfair trade practice law is for the protection of the public and not for the experts but rather for "the vast multitude which includes the ignorant, the unthinking, and the credulous, who in making purchases do not stop to analyze but are governed by appearance and general impressions."[1]

The most common form of unfair competition is the imitation of a trade name, trade symbol, or device by a competitor. This may be a family name or the name of a corporation, labels, or deceptive packaging. * * *

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[1] See *Florence Mfg. Co. v. J. C. Dowd & Co.*, 178 F. 73; *Stork Restaurant, Inc., v. Sahati et al.*, 166 F. 2d 348

In the case of *Hudson Tire Co., Inc. v. Hudson Tire and Rubber Corporation et al.*, 276 F. 59, the court stated that the word "Hudson" as applied to tires had obtained a secondary meaning, referring to plaintiff's merchandise, and the fact that defendant had secured its corporate name from the State of New York did not authorize it to use the name "Hudson" in connection with such merchandise.

The courts have likewise held that in looking for a secondary meaning in a trade-mark, it is controlled by the fact that such a meaning has been acquired in the minds of the public rather than by the time it has taken for that fact to be established.[4]

Another case in point is that of *American Products Co. v. American Products Co.*, 42 F. 2d 488. It is noted that one of the above companies was a Delaware corporation and the other one a Michigan corporation. The court said, in part:

> "Assuming, for the purposes of this opinion, that the name 'American Products Company' should be regarded as a geographical name indicating products made in America, rather than a somewhat fanciful name not intended to denote the place of manufacture of such products, it is well settled that when a person has adopted, as the name of a business, a term originally geographical, and, by his efforts and expenditures, has developed a reputation and good will for such business and its products, so that such name has come to mean, in the minds of the general public, that particular business and its products, such name thereby acquires a secondary meaning, as indicating such business, and its owner is entitled to protection, in its use, by a court of equity."

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[4] *Barton et al. v. Rexall Co., Inc.*, 2 F. 2d 402.

In the case of *American Radio Stores, Inc. v. American Radio and Television Stores Corp.*, 150 A 180, the court stated:

> "Those words (radio and stores) are purely descriptive and, when used by the complainant, have attached to them no meaning of a secondary nature. But when the word "American" is used in conjunction with them, a distinguishing mark is introduced and the complainant is entitled to be protected in its use of that distinctive feature of its name."

In the case of *Delaware L. & W. R. Co. v. Lackawanna Motor Freight Lines*, 175 Atl. 905, the court held that the rights of the plaintiff were based on a secondary meaning acquired by its use in the transportation business, and its use by defendant was a device to deceive the public, although the court held that fraudulent intent need not necessarily be shown to invoke the aid of the court.

Another case in point is *American Thread Co. v. North American Thread Co., Inc.*, 33 F. Supp. 616, where the court held that a newcomer operating under a similar name to a company already in the business was an act of unfair competition.

Another pertinent case is that of *Womble v. Parker*, 67 S. E. 2d 133, which involved a newcomer into a business wherein it attempted to advertise its products under a trade name similar to one already in use by its long-established competitor. The court said, in part.[5]

> "While geographical names and words which are merely descriptive are not generally the subject of exclusive appropriation as trade-marks or trade names,

[5] Other cases in point are: *Phillips* v. *The Governor & Co. of Adventures of England trading into Hudson Bay*, 79 F. 2d 971; *Lincoln Motor Co. et al. v. Lincoln Automobile Co.*, 44 F. 2d 812; *Finchley, Inc. vs. Finchley Co., Inc.*, 40 F. 2d 736; *Western Auto Supply Co. v. Knox*, 93 F. 2d 850.

such names and words when used so long and exclusively by a trader, manufacturer or producer that they are generally understood to designate his business or merchandise, may acquire a secondary signification or meaning indicative not only of the place of manufacture, but of the name of the manufacturer or producer, or of the character of the product, so that the name or title thus employed, including the geographical name and descriptive words, may be the subject of protection against unfair competition in trade, and authorize equity to enjoin a newcomer competitor from the appropriation and use of a trade name or trade-mark bearing such resemblances to those of the pioneer as to be likely to produce uncertainty and confusion, and to pass off the goods or business of one as those of another."

It is clear from the foregoing that a geographical term used in a business name may acquire a secondary meaning by actual use and upon which the owner may create goodwill in its business relationship with the public. Thus such a name becomes a valuable asset and a business advantage. Therefore, in such instances the trade name becomes of a pecuniary value or a property right, and the courts have consistently held that such rights are entitled to the protection afforded by the courts.

There can be no dispute that American Airlines is the prior user of the name "American" as between it and North American, as American has used the above name since 1934 and its predecessor used the name prior to that time, whereas North American has used its name only since April 1951. American has consistently over the years promoted the use of the term "American" in its advertising and public relation work. • • •

Upon consideration of all the facts, and in view of the court decisions pertaining thereto, it is concluded that the name "American" and "American Airlines" used in

connection with air transportation has acquired a secondary meaning as identifying American Airlines, Inc.

* * * * * * * *

One of the important factors in a case of this kind arising under section 411 is whether the public is being deceived or confused and thus affecting the public interest in air transportation. The court stated in the case of *Anheuser-Busch, Inc. v. Budweiser Malt Products Corporation*, 287 F. 243, that the fundamental question in cases of trade-marks or unfair competition is whether the public is being misled and deceived so that the defendant is in effect taking advantage of the good-will and business reputation of another who has built it up through service or advertising.[8]

There are numerous examples in the record indicating confusion between American and North American Airlines on the part of the public. * * *

The type of inquiries indicating confusion involved in this proceeding, which have heretofore been discussed, is typical of those occurring to the average member of the public. Naturally, such inquiries were not made by persons who are frequent travelers by air or well informed on aviation matters but rather the uninformed, and it is the interests of the uninformed that the Board is equired to protect from confusion because of similarity of names.

* * * The courts have consistently held that in cases involving violation of trade-marks the right of injunction depends not on the fact that the purchaser has been deceived but rather on the fact that the public may be deceived if such acts of confusion are permitted to continue. The proof that confusion has already existed adds to the likelihood of continued deception.[10]

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[8] See *United Drug Company* v. *Theodore Rectanus*, 248 U. S. 90.

[10] *J. C. Penney Co. v. H. D. Lee Mercantile Co.*, 120 F. 2d 949; *Ralston Purina Co. v. Saniwax Paper Co. et al.*, 26 F. 2d 941; *Wisconsin Electric Co. v. Dumore Co.*, 35 F. 2d 555; *Henry Muhs Co. v.*

There is no question but what American has acquired during the past 20 years through its constant efforts a good-will in its use of the name "American" or "American Airlines," which has become a valuable asset to be protected. However, an action for infringement of America's trade name can find its remedy in the courts. Section 411 was not designed for the purpose of protecting the private rights of an individual carrier except to the extent of a regulating competition between the various air carriers to assure fair competition and thereby maintain a sound economic transportation system; also, equally important, the Board was given the responsibility of safeguarding the public interest against unfair and deceptive methods of competition.

North American is a newcomer in the field of air transportation as compared to American's operations, and it should have known that the similarity of names between North American and American would have the capacity to confuse the public as to the true identity of the carriers. There are numerous instances of record where the public has been confused and inconvenienced by this similarity of names. • • •

The task would not have been a difficult one for North American to have adopted another trade name which was different from the names of other air carriers in operation and thereby avoid the tendency on the part of the public to mistake one carrier for the other.

In view of the public confusion which has arisen and may increase in the future as air transportation becomes a more accepted mode of travel, and the services rendered by the carriers become more alike as well as the aircraft itself, it

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Farm Craft Foods, Inc., et al., 37 F. Supp. 1913; *United Drug Co. v. Obear-Nester Glass Co.*, 111 F. 2d 997; *Pep Boys—Manny, Moe & Jack, Inc. v. Federal Trade Commission*, 122 F. 2d 158. *American Home Benefit Assn., Inc. v. United American Benefit Assn., Inc.*, 125 P. 2d 1010; *United Lace & Braid Mfg. Co. v. Barthels Mfg. Co.*, 221 F. 456.

is in the public interest that the identity of the carrier be readily distinguishable by the public. Therefore, the continued use of the name "North American" by Twentieth Century is so similar to the trade name "American" a used by American Airlines, Inc., as to constitute an unfair and deceptive practice as well as an unfair method of competition, and it is so found.

• • • • • • • • • •

Order No. E-7870

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board at its Office in Washington, D. C., on the 4th day of November, 1953

Docket No. 5774

In the Matter of the Application of NORTH AMERICAN AIRLINES, INC., for Authority to Conduct its Operations under the Name of North American Airlines, Inc.

Docket No. 5928

In the Matter of an Investigation Pursuant to Section 411 of the Act of Certain Practices of NORTH AMERICAN AIRLINES, INC.

ORDER

A full public hearing having been held in the above-entitled proceedings and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions and decision, which is attached hereto and made a part hereof;

It is ordered:

1. That the application of North American Airlines, Inc., for authority to engage in air transportation under the name North American Airlines, Inc., be and it hereby is denied;

2. That on and after the 90th day after the date of adoption of this order, North American Airlines, Inc., and its successors, assignees, representatives, agents, officers and

employees be and hereby are ordered to cease and desist from engaging in air transportation under the names North American Airlines, Inc., North American Airlines, North American, or any other name which includes the word American.

By the Civil Aeronautics Board:

(S.) M. C. MULLIGAN,
Secretary.

[SEAL.]

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

In the Matter of:

Docket No. 5774

Application of NORTH AMERICAN AIRLINES, INC., for authority to conduct its operations under the name of North American Airlines, Inc.

Docket No. 5928

Investigation pursuant to Section 411 of the Act of certain practices of North American Airlines, Inc.

EXCEPTIONS TO THE INITIAL DECISION, OF EXAMINER WALTER W. BRYAN

Communications with respect to this document should be sent to:

HARDY K. MACLAY
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Washington, D. C.
Attorneys for
North American Airlines, Inc.

July 20, 1953

(5) It is stated in Examiner Bryan's Initial Decision on page 5:

> "The above evidence generally involved numerous inquiries on the part of the public made to American employees concerning service, rates, routes, and schedules of North American under the mistaken impression that North American and American were one and the same airline."

On page 7 of his Initial Decision he states:

> "There were many other instances similar to those referred to above that need not be repeated here. In general, they indicate that certain confusion exists on the part of the public in distinguishing the services of the two airlines in question."

On page 13 of his Initial Decision he states:

> "There are numerous examples in the record indicating confusion between American and North American Airlines on the part of the public. A number of witnesses who were ticket or reservation agents for American testified that they had received numerous inquiries from the public, *indicating to them* that confusion existed in the minds of the persons making the inquiries." (Emphasis added).

On pages 16 through 17 of his Initial Decision:

> "North American is a newcomer in the field of air transportation as compared to American's operations, and it should have known that the similarity of names between North American and American would have the capacity to confuse the public as to the true identity of the carriers. There are numerous instances of record where the public has been confused and inconvenienced by this similarity of names . . . .
>
> "The task would not have been a difficult one for North American to have adopted another trade name which was different from the names of other air carriers in operation and thereby avoid the tendency on the part of the public to mistake one carrier for the other.

"In view of the public confusion which has arisen and may increase in the future as air transportation becomes a more accepted mode of travel, and the services rendered by the carriers become more alike as well as the aircraft itself, it is in the public interest that the identity of the carrier be readily distinguishable by the public. Therefore, the continued use of the name 'North American' by Twentieth Century is so similar to the trade name 'American' as used by American Airlines, Inc., as to constitute an unfair and deceptive practice as well as an unfair method of competition, and it is so found.

"In order further to protect the public interest against such unfair methods of competition it is found that a cease and desist order should be issued by the Board against the use of the name 'North American' by Twentieth Century in the manner hereinafter set forth.

"Findings.—In view of the foregoing and in consideration of all the facts of record, it is found:

"1. That the use of the name 'North American Airlines, Inc.,' 'North American Airlines,' 'North American,' or any combination of the word 'American' by Twentieth Century Airlines, Inc., constitutes an unfair or deceptive practice and an unfair method of competition within the meaning of section 411 of the Act.

"2. That the public interest requires that the application of Twentieth Century Airlines, Inc., Docket No. 5774, for authority to engage in air transportation under the name North American Airlines, Inc., be denied.

"3. That a cease and desist order be issued against Twentieth Century Airlines, Inc., its successors, assignees, representatives, agents, officers, and employees, to cease and desist doing business in air transportation under the name North American Airlines, Inc., or any variation of the name 'American.'"

Since the only actual difference between these four statements is that one appears on page 5 and the others appear on pages 7, 13 and 16 through 17, respectively, North American hereby excepts to the above-described state-

ments, findings or conclusions quoted in this paragraph (5). These above-stated quotations insofar as they purport to be findings of fact are entirely unsupported by any evidence, and insofar as they purport to be conclusions of law they are again unsupported by any evidence and are erroneous. They simply assume facts not of record, the assumption being that there is a confusing similarity between the two names. The substantial evidence which is analyzed and more adequately stated in North American's Brief to the Examiner beginning at page 26 can only support a contrary conclusion:

> "Testimony by the American Airlines agents disclosed that what was stated as fact was largely an assumption of fact. North American was often not mentioned by the caller when conversing with the American Airlines agent. If the agent had not testified to this fact, however, a reading of the *ex parte* statement unaccompanied by other facts would lead one to believe that the caller had mentioned North American and was apparently confused. Tr. 148, Exhibit No. AA-4, page 33; Tr. 155, 159-160, 161, Exhibit No. AA-4, page 18; Tr. 173-174, Exhibit No. AA-4 page 30. The agents based their conclusions, often stated as fact, upon several grounds—none of them a rational basis for deciding that the purchasing public was confused by any similarity in the corporate names. One basis was faulty, incorrect and incomplete knowledge of the facts on the part of the American Airlines agent whereby the agent would assume that the caller was referring to North American because the agent thought that North American was the only airline that had a particular plan, Tr. 143-148, 159-160, fare, Tr. 173-174, telephone exchange, Tr. 150, or office in a particular location, Tr. 148-194. All of these assumptions were incorrect, other air carriers having the plan, Tr. 295, 296-297, or fare, Tr. 294-347, and offices in the particular area, Tr. 302-303. The agents, without more competent facts than they had, could not possibly determine whether the inquirer meant North American.

"Another reason for assumptions of confusion by American Airlines' agents was that they knew that American Airlines did not give service to a particular point, or use a particular airport, but North American did give that service, or use that airport. Tr. 175, 198, 208-210. Therefore, the agents would conclude, since North American has 'American' in its name the people were referring to North American; in these cases as in others North American not even being mentioned by the inquirer. Tr. 175, 198, 208-211. These facts could not always be ascertained on the face of the *exparte* statements, however.

"Other reasons for concluding that persons were inquiring about North American were because someone would call American Airlines inquiring about non-scheduled airlines and the American Airlines agent would not bother to ascertain what specific non-scheduled carrier was desired, but instead infer that it was North American. Tr. 220.

"Still other reasons for the agent's assumption that the individual was confused was not confusion due to similarity of corporate names, but a simple wrong number. Tr. 219; Exhibit No. AA-5, page 11. However, because both applicant and intervenor have a word common to each—'American'—the agent immediately assumed confusion; again *when North American was not mentioned.* Tr. 219."

For a more detailed discussion of the evidence in this proceeding see North American's exception number (6), the discussion of which is hereby incorporated herein by reference.

In *S. C. Johnson & Son* v. *Johnson*, 28 F. Supp. 744 (W.D. N.Y., 1939), at 749, the Court said there was "considerable *testimony* which had been offered by the plaintiff purporting to show *inquiries* made by prospective purchasers . . . it is competent as showing the state of mind of the prospective purchaser." (Emphasis added). Likewise, Nims indicates that agents or employees "may *testify* . . . to the state of mind of prospective purchasers

as revealed through orders and inquiries." (Emphasis added). 2 Nims, *Unfair Competition and Trademarks*, (4th ed. 1947) § 335. These authorities restrict the rule to only those cases where the agent actually testifies, and where the agent only testifies as to *facts* of which he has personal knowledge—the inquiries and orders themselves.

Non-expert opinion by the American Airlines' agents as to whether these inquiries tended to show confusion is not a basis to support a decision. *N.L.R.B.* v. *Bell Oil & Gas Co.*, 98 F. 2d 406 (5th Cir. 1938); *In the Matter of Radio Enterprises*, 7 F.C.C. 169 (1939); *In the Matter of Wright*, 3 S.E.C. 190 (1938).

(6) Examiner Bryan, in his Initial Decision, made the following statements, findings or conclusions on pages 5 and 6:

> "An officer of American testified that he had received from employees under his supervision numerous inquiries indicating confusion between American Airlines and North American Airlines, and that his office had received numerous requests for collect telephone calls from people who were attempting to contact North American." (p. 5)
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> • • • • •
>
> ". . . There were instances of air passengers holding North American tickets attempting to check in for North American flights at American ticket counters—in fact, at the Burkbank office this was a daily occurrence—and many of the passengers were still confused after an explanation had been made that American and North American were two different airlines. There were instances where North American passengers attempted to claim their baggage at the American counter; also other instances where prospective passengers insisted they were entitled to a discount for transportation on American because they held a 'Buyers League Scrip Book.' Upon an investigation by the passengers making the inquiries, it was learned that it was North American instead of American which offered a discount.

"There were other instances of persons meeting incoming North American passengers who made inquiries at the American ticket counter at Burbank to determine time of arrival. Other inquiries were made of American agents at Los Angeles concerning an $80 fare from Los Angeles to New York, which the persons had heard advertised on television, and upon investigation it was found that it was North American they were referring to and not American." (p. 6)

* * * * * *

"Another witness for American testified that one person insisted that American flew from New York to Miami because she had heard a radio program to that effect, whereas the program in question was that of North American. There were instances where mail addressed to North American was delivered to American Airlines' office." (p. 6)

North American hereby excepts to these above-described statements, findings or conclusions which are insufficient to support a finding that North American by the use of its name is violating Section 411 of the Act and are unsupported by the testimony and other evidence presented during the hearing. Such statements obviously were made without any reasonable study of the facts by the Examiner. Argument bearing on this matter is adequately presented in North American's Brief to the Examiner, beginning at page 11:

[The remainder of Exception 6 (Tr. 856-864) consists of excerpts from respondent's brief to the Examiner (Tr. 776-789) and deals only with the question of the adequacy of the evidence to support a finding of fact that the similarity between the names North American Airlines and American Airlines had caused the public to confuse the identity of the two carriers.]

* * * * * *